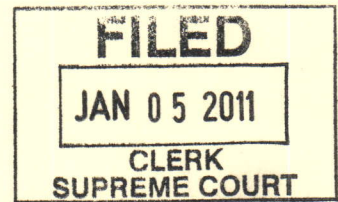


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
SUPREME COURT OF KENTUCKY
2010-SC-00322-TG



MADISON COUNTY FISCAL COURT; CITY OF
CYNTHIANA; CITY OF DANVILLE; CITY OF FLORENCE;
CITY OF GEORGETOWN; CITY OF GLASGOW; CITY OF
NICHOLASVILLE; CITY OF PARIS; CITY OF RICHMOND;
CITY OF SOMERSET; AND THE CITY OF WINCHESTER

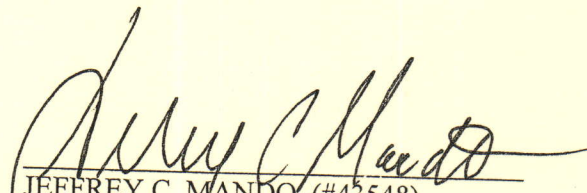
APPELLANTS

vs. APPEAL FROM FRANKLIN CIRCUIT COURT; NO 09-CI-01940
HON. THOMAS D. WINGATE, JUDGE

KENTUCKY LABOR CABINET, J.R. GRAY, in his official
capacity as Secretary of the Kentucky Labor Cabinet; MICHAEL
L. DIXON, in his official capacity as Commissioner of the
Department of Workplace Standards of the Kentucky Labor
Cabinet; MARJORIE ARNOLD, in her official capacity as
Program Manager (Eastern), Wage and Hours of the Kentucky
Labor Cabinet; JERALD ADKINS, in his official capacity as
Program Manager (Western), Wage and Hours of the Kentucky
Labor Cabinet, and UNNAMED COMPLAINANTS, individually

APPELLEES

BRIEF OF *AMICUS CURIAE*, KENTUCKY LEAGUE OF CITIES

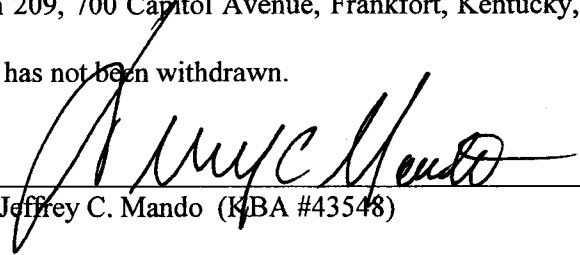


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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Brief has been served in this the 20th day of December, 2010, upon David Obrien Suetholz, Melissa Jan Williamson, Kentucky Labor Cabinet, Office of General Counsel, 1047 US 127 South, Suite 4, Frankfort, KY 40601; Douglas L. McSwain, Derrick T. Wright, Sturgill, Turner, Barker & Maloney, PLLC, 333 W. Vine Street, Suite 1400, Lexington, KY 40507; Steven C. Marin, Matthew C. Smith, Ziegler & Schneider, PSC, P.O. Box 175710, Covington, KY 41017; William A. Dykeman, Dykeman & Rosenthal, 31 W. Hickman Street, P.O. Box 910, Winchester, KY 40390-0910, Judge Thomas D. Wiggate, Franklin County Courthouse, 669 Chamberlin Avenue, P.O. Box 678, Frankfort, KY 40602-0678; Sally Jump, Clerk, Franklin County Courthouse, 669 Chamberlin Avenue, Frankfort, KY 40602-0678;; and the original to the Clerk, Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, Kentucky, 40601. I further certify that the record on appeal has not been withdrawn.



Jeffrey C. Mando (KBA #43548)

STATEMENT OF POINTS AND AUTHORITIES

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PURPOSE OF THE BRIEF.....

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Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.,
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Smith v. Lexington, 307 S.W.2d 568 (Ky. 1957).

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(Revised 2002).....

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Qualified Official Immunity Cases Involving Government-Employed
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48 U. Louisville L. Rev. 313 (Winter 2010).....

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Messina v. Burden, 228 Va. 301, 308, 321 S.E.2d 657, 600 (Va. 1984).....

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PURPOSE OF THIS BRIEF

The Kentucky League of Cities (“KLC”) is an association of 370 municipalities in the Commonwealth of Kentucky, who stand united in believing that municipalities should be entitled to sovereign immunity for all the same important reasons that support the current availability of that defense to counties and other local public entities. KLC, therefore, respectfully submits this *amicus curiae* brief for the purpose of establishing that municipalities are entitled to sovereign immunity and that *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964), should be overruled.

ARGUMENT

Sovereign immunity is “an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), citing Restatement (Second) of Torts § 895B(1) (1979). A vestige of English common law, sovereign immunity has been recognized in this country since 1793 and in this Commonwealth since 1828. *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001), citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793); *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009); *Divine v. Harvie*, 7 T.B. Mon. 739, 23 Ky. 439 (Ky. App. 1828).

The availability of sovereign immunity is important to state and local governments. It “protects [them] from burdensome interference with the performance of [their] governmental functions and preserves [their] control over state funds, property and instrumentalities. ... [Sovereign] immunity serves two policies: It shields those governmental acts and decisions impacting on large numbers of people in a myriad of

unforeseen ways from individual and class actions, the continual threat of which would make public administration all but impossible, and it preserves the autonomy of coordinate branches of government.” 57 Am. Jur.2d *Municipal, County, School and State Tort Liability* § 2.

In Kentucky, common-law sovereign immunity has always been available to the state itself and to counties. *Comair, supra* at 94. For many years, common-law sovereign immunity was also available to cities. E.g., *Smith v. Lexington*, 307 S.W.2d 568 (Ky. 1957). However, that changed with the decision of this Court’s predecessor in *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964).

In *Haney*, a young girl drowned in a swimming pool owned and operated by the City of Lexington. The girl’s estate sued the City seeking damages in connection with her death, and the City defended on the basis of sovereign immunity. The *Haney* Court abolished the common-law defense of sovereign immunity, calling it “unfair,” “unjust,” illogical and anachronistic. It did so, however, *only* with respect to municipalities, stating expressly that “it is not our intention at this time to consider the liability of any governmental unit other than that of a municipal corporation and its agents.” *Id.* at 739, 742.

Notwithstanding *Haney*’s sharp criticism of sovereign immunity, no subsequent case has ever abolished such immunity with respect to the state or counties – nor should it, in light of the important interests that sovereign immunity protects for governmental entities. In fact, in the forty-seven years since *Haney* was decided, Kentucky courts have repeatedly upheld sovereign immunity for the state and counties, *Comair, supra*, and have even *extended* sovereign immunity to many other local public entities, including

urban county governments, *Hempel v. Lexington-Fayette Urban County Government*, 641 S.W.2d 51 (Ky. App. 1992); boards of education, *Ammerman v. Board of Educ. of Nicholas County*, 30 S.W.3d 793 (Ky. 2000); municipal fire departments, *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage*, 286 S.W.3d 790 (Ky. 2009); airport boards, *Inco, Ltd. v. Lexington-Fayette Urban County Airport Bd.*, 705 S.W.2d 933 (Ky. App. 1992); and joint planning commissions, *N. Ky. Area Planning Comm'n v. Cloyd*, 2010 Ky. App. LEXIS 7.

The result, however, is that cities are treated differently than counties and many other local public entities when it comes to the availability of sovereign immunity. Specifically, counties and other local public entities are afforded the benefit of sovereign immunity, while municipalities are not. *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). There is no legitimate reason for this dichotomy.

I. THE DISPARATE TREATMENT OF MUNICIPALITIES IS BASED ON AN OUTDATED NOTION OF THEIR PURPOSE AND FUNCTION

Historically, municipalities had very limited authority. Each municipality could exercise only those powers and perform only those functions specified in its charter, granted to it by special legislation of the General Assembly, or – after the 1891 Constitution – statutorily authorized for the classification into which it happened to fall. *Kentucky Municipal Statutory Law*, Informational Bulletin No. 145 (Revised 2002), Legislative Research Commission, Frankfort, Kentucky, p. 4, 37; *Hargadon v. Silk*, 129 S.W.2d 1039 (Ky. 1939) (“ ... charters of municipal corporations, enacted by the legislature pursuant to constitutional authority, occupies the same relation to the municipality as does a constitution to a state. In other words ... a municipal charter is its

constitution, and when that charter prescribes (expressly or by necessary implication) the power and authority of a municipality no ordinance may be enacted in conflict therewith.”). The disparate treatment of counties and municipalities with respect to the availability of sovereign immunity stems from this traditional view of municipalities.

For example, in explaining why municipalities are not entitled to sovereign immunity, this Court has previously observed: “[A] ‘municipal corporation’ means nothing more than a local government entity created by the state to carry out a ‘designated’ function. ... Cities ... function as independent corporations within the range of their statutory authority and have only such powers as the legislature permits.” *Calvert Investments, Inc. v. Louisville & Jefferson Co. Metropolitan Sewer District*, 805 S.W.2d 133, 137 (Ky. 1991). *See also Kentucky Center for Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990) (“Municipal corporations are local entities created by act of the General Assembly and not agencies performing the services of central state government. As such they do not qualify for sovereign immunity.”); *Kea-Ham Contr. v. Floyd County Dev. Auth.*, 37 S.W.3d 703 (Ky. 2000) (same); *Kenton County Pub. Parks Corp. v. Modlin*, 901 S.W.2d 876, 879 (Ky. App. 1995) (“A municipal corporation means nothing more than a local government entity created by the state to carry out designated functions.”).

That view is outdated.

It is true that cities *used to have* very limited powers, but that is no longer the case. In 1980, the General Assembly adopted the principle of municipal “Home Rule,” which permits cities to “exercise any power and perform any function within its boundaries ... that is in furtherance of a public purpose of the city and not in conflict with

a constitutional provision or statute.” KRS 82.082. In 1994, a constitutional amendment reflecting the adoption of municipal “Home Rule” was ratified. Ky. Const. § 156b.

Since the adoption of Home Rule, municipalities in Kentucky are no longer limited to the performance of specific powers and duties set forth in their charters, the Kentucky Constitution, or statutes. Rather, municipalities have the power of self-governance, and may legislate in any field with the only limitation being that municipal legislation not conflict with state legislation. KRS 82.082. As such, the powers of municipalities are now at least as broad as the powers afforded to counties by KRS 67.083.

Thus, it is no longer true that municipalities have limited powers relative to counties, such that the traditional basis for differentiating between municipalities and counties with respect to the application of sovereign immunity no longer exists.

Consequently, municipalities ought to be entitled to sovereign immunity to the same extent as counties and other local public entities.

II. IT IS ARBITRARY TO TREAT MUNICIPALITIES DIFFERENTLY THAN COUNTIES AND OTHER LOCAL PUBLIC ENTITIES WHEN IT COMES TO THE AVAILABILITY OF IMMUNITY

It is arbitrary to allow counties and other local public entities sovereign immunity, and yet to deny such immunity to municipalities.

Sovereign immunity is concerned with “protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation. *Com. of Ky. v.*

Aubrey, 2010 Ky. App. LEXIS 214 (November 19, 2010), quoting *Messina v. Burden*, 228 Va. 301, 308, 321 S.E.2d 657, 600 (Va. 1984). See also *Dethroning Gould v. O'Bannon: A Lone Star State Solution for Qualified Official Immunity Cases Involving Government-Employed Medical Professionals in the Bluegrass State*, 48 U. Louisville L. Rev. 313 (Winter 2010); 57 Am. Jur.2d *Municipal, County, School and State Tort Liability* § 2. As such, it serves important governmental concerns.

All local public entities that engage in legislative and other decisionmaking – including municipalities – are equally affected by these concerns. Yet, the state of the law is such that only municipalities must fear that vexatious litigation will deplete their limited financial resources or unduly influence the conduct of their affairs. Counties and other local public entities that enjoy sovereign immunity may make legislative and other decisions without such fear.

This state of affairs is unfair and arbitrary from the perspective of the municipal taxpayer. As Justice Wintersheimer once noted:

... more than half of the population has chosen to incorporate into municipalities. To expose half of the taxpayer-supported governments to potential liability while the remainder is immune seems to conflict with the general concept of equal protection of the law. ...

The people of a community come together to create a local government. The precise form of that government is unimportant to them. The public demands the kind of government most responsive to its needs. Certainly, the public does not want any undue liability resulting from the selection of a form of government. *Gas Service Company, Inc. v. City of London*, 687 S.W.2d 144, 150-151 (Ky. 1985) (concurring opinion).

As Justice Wintersheimer obviously foresaw, the current state of the law means that a municipality is subject to liability when, on the same or similar facts, a county is not. For example, a county was immune from liability where a plaintiff alleged that a

county deputy sheriff was negligent in failing to search an arrestee, who committed suicide while in custody with a weapon that was in his possession at the time of the arrest. *Franklin Co. v. Malone*, 957 S.W.2d 195 (Ky. 1997) (overruled on other grounds). Of course, had the law enforcement official in question been a municipal police officer instead of a county deputy sheriff, the city that employed him would have been subject to liability. It is arbitrary to afford sovereign immunity to one form of government and not the other on the same set of facts.

Indeed, other states have recognized the inherent capriciousness of treating municipalities differently from other local public entities when it comes to the availability of sovereign immunity. For example, the Florida Supreme Court has said:

... the philosophy of Florida's present constitution [is] that all local governmental entities be treated equally. Since 1968, municipal corporations, counties, and school districts have been in constitutional parity with one another and possess equal taxing powers. Art. VIII, Fla.Const. ... We also note that our present constitutional scheme allows municipal-county total or partial consolidation as an option for municipal and county governments to provide more efficient services. Art. VIII, §§ 3-4, Fla.Const.

Municipalities can no longer be identified as partial outcasts as opposed to other constitutionally authorized local governmental entities. Our cities currently provide a substantial portion of our public services, funded in part with state and federal revenues. Municipal ordinances are now enforced in state courts by state officials. Cities furnish the majority of our police and safety protection; provide a substantial portion of our public recreational facilities; and maintain a significant portion of public streets. In a similar light, our twenty-three-year-old statement that the 'modern city is in substantial measure a large business institution,' ... can no longer justify disparate treatment of our municipalities. Many of our metropolitan counties now function in an identical capacity.

...

It is our decision that, in this state, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner. *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981) (internal citations omitted).

Likewise, the Michigan Supreme Court has said:

... what distinction in law, logic, or reason is there to maintain a distinction between a city, as above specified, and a county, a township, or a village? We see none. All are creatures of the Constitution with the powers and immunities provided by law. In the case of a county which might historically be differentiated, the Constitutions of 1908 and 1963 both define them as a "body corporate." Rightfully, we inquire again what distinguishes a constitutional "body corporate" from a "municipal corporation." In candor, we must say the distinction, if any, is one without a difference. If someone falls down an unguarded elevator shaft in the city hall, he recovers if the shaft were negligently maintained. If the identical occurrence eventuates in the county courthouse, the village or township hall, the injured person is without redress. A tortious act by a city policeman is compensable in damage, the identical act perpetrated by a county deputy sheriff, a village or township constable is not. We should not perpetuate such anomalies.

Myers v. Genesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (Mich. 1965).

Of course, § 2 of the Kentucky Constitution forbids the exercise of arbitrary power over the lives, liberty and property of citizens. To the extent that the disparate treatment of municipalities subjects one set of taxpayers to liability when a different set of taxpayers would be immune under the same circumstances, it is arbitrary and unconstitutional.

Sovereign immunity serves important governmental interests, and counties and other local public entities rightfully enjoy such immunity. Municipalities – and their taxpayers – must be protected by common-law sovereign immunity to the same extent that counties and other local public entities – and the taxpayers that support them – enjoy that defense. Consequently, *Haney* must be overruled.

CONCLUSION

In light of the foregoing, *Haney* must be overruled and common-law sovereign immunity must be restored to municipalities.



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